No. 82-1869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORRIS L. LEVY, et al.,

Petitioners,

v.

WILLIAM B. WEINBERGER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Counter-Statement of the Question Presented for Review

Whether the unanimous Court of Appeals correctly held that the District Court, on the facts of this case, did not abuse its broad discretion in: (i) approving as fair, reasonable and adequate a partial class action settlement of nearly $4,000,000 (including accrued interest), and (ii) taking pendent jurisdiction over state common law claims arising out of the identical facts and transactions underlying the federal claims.

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This Brief in Opposition to the Petition for a Writ of Certiorari is respectfully submitted by the plaintiffs-class representatives in this litigation. The plaintiffs-class representatives are William B. Weinberger, Edith Citron, Robert Smith, Stein Family Foundation, Inc., Leo E. Panzirer and Emanual G. Rosenblatt. In addition, over 26,000 persons have filed proofs of claim seeking to participate in the settlement fund.

Opinions Below

The opinion of the District Court is reported at 91 F.R.D. 494 (S.D.N.Y. 1981). The opinion of the Court of Appeals is reported at 698 F.2d 61 (2d Cir. 1982).

Statement of the Case

The Petition seeks review by this Court of a partial settlement of $2,840,000[1] with respect to class action claims against the defendant banks. The settlement was approved by the district court judge who had been presiding over this case since 1975 as fair, reasonable and adequate in light of the strengths and weaknesses of the case. His determination was affirmed by an unanimous Court of Appeals.

The action was commenced by the filing of complaints in two federal class actions, *Weinberger, et al.* v. *Kendrick, et al.* and *Panzirer* v. *Peterkin, et al.* These actions were filed on October 3, 1975 and October 22, 1976, respectively, and asserted claims on behalf of classes consisting of persons who had purchased securities of W.T. Grant Company (Grant) during the 34 months prior to that company's bankruptcy on October 2, 1975. The defendants named in the actions included financial institutions (the banks) that loaned Grant more than $600 million prior to its bankruptcy, and Dewitt Peterkin, Jr., a former vice-chairman of Morgan Guaranty Trust Company and a Grant director. The complaints alleged that the defendants had dominated the management of Grant in the years

[1] Interest has been accruing at prevailing rates since the settlement was submitted to the District Court, approximately three years ago. The amount of the settlement fund is now approximately $4,000,000.

preceding its bankruptcy and had concealed from the public both the seriousness of Grant's financial predicament and the inflated value of Grant securities. The plaintiffs asserted, among other things, claims against the defendants-respondents based on §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, and common law fraud. The complaints in *Weinberger* and *Panzirer* were superseded by a consolidated amended complaint (hereinafter the *Weinberger* suit), filed July 25, 1980, along with the proposed settlement.

After five years of litigation, including motions to dismiss, amendments of the complaints, discovery of tens of thousands of documents, depositions, hearings, etc., the plaintiffs and the defendant banks agreed on a settlement.

On July 25, 1980, the parties in the *Weinberger* suit presented to the United States District Court the proposed settlement of the claims against the banks. The District Court entered an order directing a hearing to be held on February 18, 1981 to determine whether the proposed settlement should be approved by the Court as fair, reasonable and adequate. The Court also provided that a notice of pendency of action, class action determination, settlement and settlement hearing be mailed to the class members.

The notice of pendency of action, class action determination, settlement and settlement hearing, mailed in December, 1980, advised the class members of the date of the hearing. The notice described the nature of the action, the terms of the settlement and the definition of the class that would be bound by the proposed judgment to be entered if the settlement were approved. The notice stated that any class member who did not desire to be a member of the class could exclude himself from the class and that

any class member who did not request exclusion could, if he desired, enter an appearance through his counsel.

The notice also set forth the nature of the claims that would be released if the settlement were approved, called the class members' attention to the pendency of the *Lewy* action[2] in New York State Court and stated that participation in the *Weinberger* settlement would preclude any participation in the *Lewy* case.

The notice also informed the class members of the procedure to file a proof of claim in the *Weinberger* suit to receive the settlement funds. As of May 19, 1981, the last day to file a proof of claim, more than 26,000 proofs of claim to participate in the *Weinberger* settlement had been filed.

The State Court *Lewy* Action

After the filing of the *Weinberger* suit in the federal court, the attorney for the petitioners herein, I. Walton Bader, commenced an action (the *Lewy* case) in New York State Court in which the petitioners sought to represent a class of Grant security holders. Thereafter, unlike the *Weinberger* case, the *Lewy* action lay dormant for nearly four years. It was only when informed that a settlement in the *Weinberger* case was being discussed that the attorney for the petitioners attempted to activate the *Lewy* case.

After being informed of the settlement negotiations in the *Weinberger* suit, the attorney for the petitioners made three motions in the *Lewy* case, all designed to establish a jurisdictional conflict between the federal court and the state court. The first was to have *Lewy* certified as a class action. The second was for a preliminary injunction pre-

[2] Described below.

cluding the banks from taking any steps in the *Weinberger* suit which would be "in derogation of the jurisdiction of the state courts" to decide the state law claims. The third was for authority to permit the plaintiffs in *Lewy,* even though not certified as class representatives, to opt out a subclass consisting of all holders of Grant securities from the proposed settlement in the *Weinberger* case.

The three motions made by the *Lewy* plaintiffs were all denied by Justice Martin Evans of the New York State Supreme Court. In his decision, handed down January 5, 1981, N.Y.L.J., p. 6, January 8, 1981, Justice Evans noted that:

> "It is clear that the litigation in the Federal Court [the *Weinberger* suit], which presently encompasses the claims made here and which contains as plaintiffs not only the class proposed here but others; and in which not only these defendants, but additional ones, is a more comprehensive lawsuit. Federal discovery proceedings both in the Bankruptcy Court and the District Court have proceeded at a greater rate than in this case."

Failing in his attempt to have the state court disrupt the settlement, the attorney for the petitioners filed objections to the *Weinberger* settlement in the federal court. His objections were found meritless by the district court judge and on appeal by an unanimous Court of Appeals.

Misstatements of Fact Contained in the Petition for Writ of Certiorari

The petition for writ of certiorari contains numerous misstatements of fact. Some of the more blatant are set forth below, followed in each instance by the facts determined by the District Court and by the Court of Appeals.

1. There was no effort ". . . by the District Court or the Court of Appeals to determine the fairness and adequacy of the settlement." (Pet., p. 4)

Judge Duffy found that:

> ". . . the sum offered in settlement by the defendants is fair considering the likelihood of plaintiffs' success on the merits. Plaintiffs' position with respect to each claim in this case is not so strong that settlement should be lightly rejected. Plaintiffs' claims against the defendants are complex and not easily proven. Indeed, plaintiffs have heavy burdens of proof with respect to each claim and the establishment of damages." 91 F.R.D. at p. 496.

The Court of Appeals stated:

> "Accordingly, we will demand a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it in such cases than where a class has been certified and class representatives have been recognized at an earlier date. As discussed below, we are satisfied that the settlement in this case meets these requirements." 698 F.2d at 73.
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> ". . . our own examination of the record leads us to conclude that the court had before it sufficient materials to evaluate the settlement and came to the correct conclusion." 698 F.2d at 74.

2. The settlement was "five-hundredths of a cent on the dollar of claims." (Pet. p.4) "It has been conceded by all parties, in the prior proceedings in ths case, that the amount of the present settlement is about $.05 on the dollar of claims." (Pet. p.17)

There has been no such concession. There is nothing in the record to support petitioners' speculation as to damages. In fact, the extreme difficulty of determining damages was one reason leading to a settlement. As the Court of Appeals stated: ". . . no determination has been made how even the gross amount of the settlement compares to the amounts claimed." 698 F.2d at 65.

3. ". . . the State breach of fiduciary duty, conspiracy, and breach of trust claims were extremely strong." (Pet. p.5).

The Court of Appeals determined:

> ". . . we confront the reiterated contention by appellants that the state law fraud and breach of fiduciary duty claims faced less worrisome legal obstacles than did the federal securities law claims. Such a position runs counter to generally received learning. (citations omitted) For example, the plaintiff's burden of proof in a common law fraud case—clear and convincing evidence—is more demanding than in a Rule 10b-5 case. (citations omitted) Similarly, Rule 10b-5 is typically regarded as better suited than common law fraud principles for application to novel theories of securities frauds—which is admittedly the type of action involved in *Weinberger/Panzirer*. . . . In the light of all this, we conclude that the common law fraud claims against the defendants were generally less valuable than the Rule 10b-5 claims of actual purchasers of Grant securities, and that it was not unfair for the settlement's distribution formula to reflect this.
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> We are similarly unimpressed by the appellants' contentions as to the strength of their common law breach of fiduciary duty claims." 698 F.2d at 78.

* * *

"Plaintiffs would have faced serious difficulties in establishing the existence of a fiduciary relationship between a lending bank and the security holders of a borrowing corporation. While such a development is not beyond the realm of possibility, it would have required a significant extension of existing procedures." 698 F.2d at 78.

* * *

In light of all this, we agree with appellees that the state law claims were extremely weak and that the proposed settlement's treatment of such claims was fair and adequate. . . ." 698 F.2d at 79.

4. "These [pendent common law] claims were never interposed into this action until the state court litigation was moving forward to trial and, at that time, were merely interposed into the case to destroy these claims for the benefit of the defendants and the plaintiffs' counsel." (Pet. p.5) ". . . the plaintiffs in *Weinberger* and the defendant banks collusively decided to destroy the viability of the *Lewy* action. . . ." (Pet. p.7). "In the case at Bar it is conceded that the State Claims involved were presented, for the first time, in the State Court and were only 'copied' by the parties in *Weinberger* as part of the settlement objected to in this proceeding." (Pet. p.22)

No such concession was made, nor could have been made, since it is contrary to the facts. As the Court of Appeals noted, the *Weinberger* complaint, filed on October 2, 1975 (prior to the filing of the *Lewy* litigation) ". . . asserted, among other things, claims against the defendant-appellees based on §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Rule 10b-5, promulgated thereunder, 17 C.F.R. §240.10b-5, and *common law fraud*." 698 F.2d at p. 64 (emphasis added).

As to petitioners' charges of collusion and bad faith, Judge Duffy expressly found that counsel for the class had conducted protracted arm's-length negotiations "in good faith" and noted "the absence of any indication of collusion. . . ." 698 F.2d at pp. 69 and 74.

5. Morgan Guaranty Bank was "effectively in control of WT GRANT COMPANY." (Pet. p.5) "In the present case PETERKIN was the controlling director of WT GRANT COMPANY . . . he so manipulated the corporation so as to protect the position of the creditor banks and destroy the position of the stockholders and debenture holders of that corporation." (Pet. p.18)

As noted by the Court of Appeals:

> "Rule 205 examinations were taken of all the principal officers and directors of Grant, the principal officers at Morgan Guaranty responsible for dealings with Grant, and two officers of other major lending banks. The testimony ran to some 10,000 pages. The trustee also subpoenaed those files of Grant's principal lenders which related to the company—comprising hundreds of thousands of documents. In short, the trustee conducted a far-reaching and intensive probe of the banks' involvement in Grant's affairs during the class period.
>
> Despite his extensive investigations, Grant's trustee concluded that his chance of proving any fraud or other wrongdoing by the lending banks were extremely slim, *cf.* 4 B.R. at 73-79 (Judge Galgay's approval of similar determinations by the trustee)." 698 F.2d at 66
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> "Plaintiffs' counsel had engaged in a wide range of discovery during the four years prior to the commencement of settlement discussions. They had access to, and reviewed, both the bank documents subpoenaed by the

> trustee and the testimony from the Rule 205 examinations he conducted. In addition, plaintiffs' counsel deposed several officers of Morgan Guaranty, paying particular attention to the relationship between that bank and Grant during the class period. Like Grant's trustee and Judge Galgay, however, plaintiffs' counsel found virtually nothing to substantiate their allegations against the banks . . ." 698 F.2d at 67

In addition, Judge Duffy considered the merits of the case and concluded that the settlement was fair in view of the difficulties plaintiffs would confront if the case went to trial. 91 F.R.D. at 496. The Court of Appeals affirmed and stated ". . . our own examination of the records leads us to conclude the court had before it sufficient materials to evaluate the settlement and came to the correct conclusion." 698 F.2d at 74.

The facts (and the misstatements in the petition) are of particular importance, as the discretionary ruling of the District Court as to whether a proposed settlement is fair, reasonable and adequate depends on the facts of each case.

Reasons for Denying the Writ

Certiorari is rarely granted ". . . to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). Review is less likely where the facts found by the District Court receive the concurrence of the Court of Appeals. This Court has repeatedly stated that: ". . . it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi* v. *District Director, Imm. & Nat. Serv.,* 385 U.S. 630, 635 (1967) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949)). As explained in *Berenyi, supra,* the Su-

preme Court possesses no empirical expertise to set against the reasonable conclusions of lower courts on factual issues.

Further, all courts which have considered the issue have held that the standard for review of approval of a settlement is "clear abuse of discretion." *Girsh* v. *Jepson,* 521 F.2d 153, 156 (3d Cir. 1975); *Bryan* v. *Pittsburgh Plate Glass Co.,* 494 F.2d 799, 801 (3d Cir. 1974), *cert. denied sub nom., Abate* v. *Pittsburgh Plate Glass Co.,* 419 U.S. 900 (1974); *Kohn* v. *American Metal Climax, Inc.,* 489 F.2d 262, 264 (3d Cir. 1973); *Shlensky* v. *Dorsey,* 574 F.2d 131, 149 (3d Cir. 1978); *Cotton* v. *Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977); *Young* v. *Katz,* 447 F.2d 431, 435 (5th Cir. 1971); *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 455 (2d Cir. 1974).

It has been long recognized that a district court's determination of the adequacy of a proposed class action settlement should be accorded considerable deference. *West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir. 1971), *cert. denied sub nom., Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *Newman* v. *Stein,* 464 F.2d 689, 692 (2d Cir. 1972), *cert. denied sub nom., Benson* v. *Newman,* 409 U.S. 1039 (1972); *City of Detroit* v. *Grinnell Corp., supra,* 495 F.2d at 454-55 (2d Cir. 1974); *Patterson* v. *Newspaper & Mail Deliverers' Union,* 514 F.2d 767, 771 (2d Cir. 1975). The trial judge "is exposed to the litigants, and their strategies, positions and proof. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Ace Heating & Plumbing Co.* v. *Crane Co.,* 453 F.2d 30, 34 (3d Cir. 1971). Thus, this issue is particularly inappropriate for this Court's review.

The discretionary ruling of the District Court to entertain the common law claims as a matter of pendent jurisdiction is also not a matter that merits the review of this

Court. Importantly, pursuant to the opt-out procedures established by the District Court, all class members were notified that those who did not wish to have their claims settled in the federal forum needed only to request exclusion, and could, if they so chose, prosecute their claims in the state court with the petitioners' attorneys. Nevertheless, after receiving notice of the proposed settlement, over 26,000 persons elected to file proofs of claim to participate in the *Weinberger* settlement.

The Court of Appeals in affirming the District Court's exercise of discretion in taking pendent jurisdiction of claims of Grant's security holders noted, *inter alia:* (1) that the federal and state claims arose of a common nexus of law and fact; (2) that the federal claims in *Weinberger* were constitutionally substantial; (3) that only in the federal court could a complete disposition of the federal and state court claims be had; (4) that all claims were being adequately compensated by the settlement; and (5) the exercise of pendent jurisdiction in this case did not require a party not otherwise subject to suit in Federal Court to defend himself in that forum.

In sum, Judge Friendly, speaking for the unanimous Court of Appeals, concluded:

> "The circumstances here are about as powerful for the exercise of a pendent party jurisdiction as can be imagined." 698 F.2d at 76.

Finally, there is no conflict among the circuit courts on the usefulness of temporary settlement classes. *Plummer* v. *Chemical Bank*, 668 F.2d 654 (2d Cir. 1982); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979), *cert. denied sub nom., Iowa Beef Processors, Inc.* v. *Meat Price Investigators Association*, 452 U.S. 905 (1981); *Ace Heating & Plumbing Co.* v. *Crane Co., supra; In re Cor-*

rugated Container Antitrust Litigation, 643 F.2d 195, 223 (5th Cir. 1981) ("Rule 23 includes no language proscribing combined notice of a class action and a proposed settlement."); *Marshall* v. *Holiday Magic, Inc.,* 550 F.2d 1173, 1176 (9th Cir. 1977); *Valerio* v. *Boise Cascade Corp.,* 80 F.R.D. 626, 639 (N.D. Cal. 1978), *aff'd,* 645 F.2d 699 (9th Cir), *cert. denied,* 454 U.S. 1126 (1981).

CONCLUSION

No reason having been shown why this Court should issue its writ of certiorari, plaintiffs-respondents respectfully submit that the petition be denied.

Dated: June 21, 1983

Respectfully submitted,

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